IN THE SUPREME COURT OF MISSOURI

JAMES L. DRURY, et al.,	)	
	)	
Plaintiffs/Respondents/Cross-Appellants,	)	
	)	
v.	)	No. 83901
	)	
CITY OF CAPE GIRARDEAU, MISSOURI,	)	
	)	
Defendant/Appellant/Cross-Respondent.	)	

SUBSTITUTE BRIEF OF APPELLANT CITY OF CAPE GIRARDEAU

Appeal from the Circuit Court of Cape Girardeau County
The Honorable Robert C. Stillwell, Presiding

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JURISDICTIONAL STATEMENT

On April 5, 1999, Plaintiffs/Respondents/Cross-Appellants James L. Drury and Midamerica Hotels Corporation filed a petition in the Circuit Court of Cape Girardeau County seeking a judicial declaration as to the validity of two ordinances of Defendant/Appellant/Cross-Respondent City of Cape Girardeau. Legal File ("L.F.") at 1, 5. On October 4, 2000, the trial court entered a judgment granting summary judgment in favor of the plaintiffs on one of their claims, enjoining the enforcement of one city ordinance, and staying its judgment pending appeal. L.F. at 366. The same judgment granted summary judgment in favor of the City on the plaintiffs' six remaining claims. L.F. at 366.

On October 16, 2000, the City filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. at 369; § 512.020, RSMo; Rule 81.04(a). On November 3, 2000, the plaintiffs filed a motion for new trial. L.F. at 375. On November 22, 2000, the trial court denied the motion. L.F. at 388. On December 1, 2000, the plaintiffs filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. at 388; § 512.020, RSMo; Rule 81.04(a).

Jurisdiction was proper in the Court of Appeals pursuant to Article V, Section 3, of the Missouri Constitution because this case does not involve the validity of a treaty or statute of the United States or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title

to any state office, or the imposition of the death penalty. The Circuit Court of Cape Girardeau County is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. § 477.050, RSMo.

On June 26, 2001, a panel of the Missouri Court of Appeals, Eastern District, rendered an opinion affirming the judgment of the trial court. On July 11, 2001, within fifteen days of the opinion, the City filed a timely motion for rehearing and alternative application for transfer in the court of appeals. Rule 84.17; Rule 83.02. On August 9, 2001, the court of appeals denied the motion for rehearing and alternative application for transfer.

On August 24, 2001, within fifteen days of the denial of the motion for rehearing and alternative application for transfer in the court of appeals, the City filed a timely application for transfer in this Court. Rule 83.04. On September 25, 2001, this Court sustained the application for transfer. This Court has jurisdiction to entertain appeals on transfer from the court of appeals pursuant to Article V, Section III, of the Missouri Constitution.

STATEMENT OF FACTS

This case involves the validity of two ordinances passed by Defendant/Appellant/Cross-Respondent City of Cape Girardeau. In their second amended petition, Plaintiffs/Respondents/Cross-Appellants James L. Drury and Midamerica Hotels Corporation sought a declaratory judgment that the City's Ordinance 2403 and Ordinance 2465 were invalid as well as an injunction preventing the City from enforcing the ordinances. The trial court rejected all of the plaintiffs' claims except one. The trial court found that Ordinance 2403 did not have all of the subjects of the ordinance clearly expressed in its title. The trial court entered judgment in favor of the plaintiffs on that claim and enjoined the city from enforcing the ordinance, but stayed enforcement of the judgment pending appeal. The trial court entered judgment in favor of the City on the plaintiffs' remaining claims. Both the City and the plaintiffs appeal.

This case was decided on cross motions for summary judgment. The City filed a single motion for summary judgment as to all of the plaintiffs' claims. L.F at 91. The plaintiffs filed four motions for "partial" summary judgment, each addressed to a different aspect of their legal arguments. L.F. at 45, 168, 195, 305. The undisputed facts revealed by these motions are set forth below.

This case involves the City's Ordinance 2403 and Ordinance 2465. Ordinance 2403 was approved and passed by the city council of Cape Girardeau on

August 17, 1998. L.F. at 92 (¶ 5), 224 (¶ 5). The title of Ordinance 2403 is as follows:

> AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION.

L.F. at 6, 92 (¶ 4), 224 (¶ 4). A copy of Ordinance 2403, which appears in the Legal File at page 115, is included in the appendix to this brief at A-1.

Ordinance 2403 amends section 15-397 of the City's Code of Ordinances by increasing the license tax on hotels and motels from "three (3) percent of gross receipts derived from transient guests for sleeping accommodations" to "four (4) percent." L.F. at 115-116. The bill also extends the expiration date of the license tax from November 1, 2004, to December 31, 2030. L.F. at 115-116. The bill does not increase the license tax on restaurants, which remains at "one (1) percent

of gross receipts derived from the retail sale of food prepared by the restaurant." L.F. at 115-116.

The stated purpose of the ordinance is to help raise revenue for the construction of a performing arts center, museum, and associated cultural facilities for the City in cooperation with Southeast Missouri State University. L.F. at 117. The proceeds of the taxes generated under Ordinance 2403 are earmarked to "pay principal and interest on bonds to be issued for the purpose of paying a portion of the costs of acquiring, constructing, furnishing, and equipping" the center, museum, and cultural facilities. L.F. at 117.

Ordinance 2403 contemplates that the State of Missouri and the University will commit funds by December 31, 2001, in an amount sufficient to complete the project. L.F. at 117. If the necessary funds are not committed by that date, Ordinance 2403 states that "the increase to the hotel/motel tax and the extension of the hotel/motel and restaurant taxes authorized under [the ordinance] shall terminate," and all proceeds from the increased tax received by December 31, 2001, "shall be used to reduce the City's outstanding general obligation indebtedness on the Show Me Center Bonds." L.F. at 117. Ordinance 2403 provides that the tax revenues would be "subject to annual appropriation by the City Council." L.F. at 117. There is no other ordinance in the City's Code of Ordinances that imposes a license tax on gross receipts of hotels and restaurants for

the purpose of generating revenue to construct a performing arts center and related cultural facilities. L.F. at 96 (¶ 22), 247 (¶ 22).

After the passage of Ordinance 2403, section 15-397 of the City Code states as follows:

> There is hereby levied a license tax on hotels and motels in an amount equal to four (4) percent of gross receipts derived from transient guests for sleeping accommodations, and on caterers serving one hundred (100) or more people at any one (1) function and on restaurants in an amount equal to one (1) percent of gross receipts derived from the retail sale of food prepared by the restaurant, or by using the restaurant's facilities, on or off the premises and sold for immediate consumption within or away from the premises. This license tax shall be in addition to all other license taxes which are applicable to hotels, motels and restaurants, but shall not apply to gross receipts derived from sales made to individuals or entities showing proof of their exemption from Missouri or federal sales taxes. Further, this license

tax is hereby extended from its present expiration date on November 1, 2004, to December 31, 2030.

L.F. at 257. Section 15-397 is reproduced in the appendix to this brief at A-15.

Section 15-396 of the City Code, entitled "Definitions and rules of construction," states in part: "Terms used in this article shall have the meanings ascribed to them in this section and shall be construed as indicated in this section." L.F. at 257. Section 15-396 contains the following definition: "*Gross receipts* is based upon the applicable revenue received by the licensee and not on the basic charge made to the customer by the licensee. For example, gross receipts shall be construed to include all sales taxes." L.F. at 257. This provision appears in the appendix to this brief at A-15.

The definition of gross receipts found in section 15-396 has been in force since prior to the passage of Ordinance 2403. L.F. at 258. On March 30, 1984, the former city attorney wrote to Robert Hendrix of the Cape Girardeau Chamber of Commerce, of which the plaintiffs are members, explaining the definition of "gross receipts" for the purposes of the hotel/motel/restaurant tax. L.F. at 260-61.

Section 15-396 of the City Code was most recently amended in 1998, although the definition of gross receipts was unchanged. L.F. at 258. A copy of the ordinance amending section 15-396 of the City Code, including the unchanged

definition of gross receipts, was mailed to Defendant Midamerica Hotels Corporation at its Cape Motor Lodge on May 22, 1998. L.F. at 258-59, 272.

Plaintiff James L. Drury and Robert A. Drury wrote to the mayor and city council of the City in a letter dated August 17, 1998, stating, in part: "On behalf of Midamerica Hotels Corporation and Drury Inns, Inc. we express our support for the River Campus Project and the one percent tax initiative (Sec. 15-397). Although the time interval has been very short to review and discuss all concerns, we feel that the City and the University have made strides to address certain concerns and incorporate some of them in the project ordinance." L.F. at 276. During the discussion of Ordinance 2403 (then known as Bill No. 98-166) in the city council, it was noted "that a group of hotel owners sent a letter indicating they approve of the one percent increase in the hotel tax." L.F. at 326. Mr. Purcell, one of the councilmen who voted on the proposed Ordinance 2403, "reminded the Council that at the last City Council meeting, he made a motion, which was approved, committing the university and the city to set public meetings to inform the public about this project." L.F. at 326.

The other ordinance at issue is Ordinance 2465, a copy of which is included in the appendix to this brief at A-7. L.F. at 135. Passed on December 21, 1998, Ordinance 2465 authorizes the city manager to execute a cooperation agreement between the City and the University. L.F. at 135. Under the terms of the

agreement, which is attached to Ordinance 2465, the proceeds of the additional one-percent tax mentioned in Ordinance 2403 will be transferred to the University for payment into a special fund for the payment of bonds issued in connection with the joint project. L.F. at 137-38. Any payments to be made by the City pursuant to the project would be "subject to annual appropriation by the City Council." L.F. at 137.

Section 3.15 of the Cape Girardeau City Charter enables the city council to "adopt an emergency measure which shall take effect immediately upon its passage, if it contains a declaration describing in clear and specific terms the facts and reasons constituting the emergency." L.F. at 131. The emergency procedures authorized under the charter are restricted to four events, one of which is "calling an election or providing for the submission of a proposal to the people." L.F. at 131. The city council declared in Article 9 of Ordinance 2403 that "an emergency exists as provided for in Section 3.15 of the City Charter . . . in that the Election Authority, under the time of notice provision set forth in Section 115.125 of the Revised Statutes of Missouri, must be notified not later than 5:00 o'clock p.m. on August 25, 1998, of an election to be held on November 3, 1998." L.F. at 117. The council "further found and declared that calling an election and providing for the submission of a proposal to the people is an emergency measure" as provided for in the City Charter. L.F. at 117-18.

Article X, Section 22, of the Missouri Constitution (part of the Hancock Amendment) prohibits counties and other political subdivisions of the state from increasing the current levy of an existing tax, license, or fee "without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon." Mo. Const., art. X, § 22; L.F. at 94 (¶ 14), 241 (¶ 14). The following ballot proposition was submitted to a vote of the registered voters of the City on November 3, 1998:

Question

> Shall the license tax on hotels and motels set out in Section 15-397 of the Code of Ordinances of the City of Cape Girardeau, Missouri, be increased from three (3) percent to four (4) percent of gross receipts derived from transient guests for sleeping accommodations, and shall the license tax on hotels, motels and restaurants set out in that section be extended to expire on December 31, 2030, for the purpose of paying a portion of the costs of acquiring, construction, furnishing and equipping a performing arts center, museum and associated cultural facilities for the City of Cape Girardeau and Southeast

Missouri State University to be located at the

University's River Campus?

L.F. at 92-93 (¶ 8), 224 (¶ 8). The result of the election on November 3, 1998, was that the measure passed with a majority of fifty-three percent of the votes cast. L.F. at 92-93 (¶ 8), 224 (¶ 8). The increase in the tax as provided in Ordinance 2403 is being enforced and collected by the City from hotels and motels located within the corporate limits of Cape Girardeau, Missouri, and has been since January 1, 1999. L.F. at 93 (¶ 10), 225 (¶ 10).

Section 3.14(a) of the City Charter provides, inter alia, that: "No ordinance except those making appropriations of money and those codifying or revising existing ordinances shall contain more than one (1) subject, which shall be clearly expressed in its title." L.F. at 130, 93-94 (¶ 11), 241 (¶ 11).

Section 115.577 of the Missouri Revised Statutes requires that any action brought to contest an election must be brought "not later than thirty days after the official announcement of the election result by the election authority." § 115.577, RSMo. L.F. at 94 (¶ 12), 241 (¶ 12). The plaintiffs initiated this action on April 5, 1999. L.F. at 94 (¶ 13), 241 (¶ 13).

Article X, Section 10.1, of the City Charter provides: "The council shall have power by ordinance to license, tax, and regulate all businesses, occupations, professions, vocations, activities, or things whatsoever set forth and enumerated by

the statutes of this state now or hereafter applicable to constitutional charter cities, or cities of the third or fourth class, or of any population group, and which any such cities are now or may hereafter be permitted by law to license, tax and regulate." L.F. at 132, 94-95 (¶ 17), 242 (¶ 17). This provision incorporates by reference Section 94.110 of the Missouri Revised Statutes. L.F. at 302-03; *Erb Industrial Equipment Co. v. City of Cape Girardeau*, 845 S.W.2d 551, 552 (Mo. banc 1993). Section 94.110 of the Missouri Revised Statutes expressly grants the "power and authority to levy and collect a license tax on . . . hotels . . .; and to levy and collect a license tax and regulate . . . restaurants." § 94.110, RSMo.

Section 71.610 of the Missouri Revised Statutes prohibits Missouri municipal corporations from imposing a license tax "upon any business . . . unless such business . . . is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute." § 71.610, RSMo. Because the City Charter incorporates by reference Section 94.110 of the Missouri Revised Statutes, the City is empowered to levy and collect a license tax on hotels and restaurants. L.F. at 302-03; *Erb Industrial Equipment Co. v. City of Cape Girardeau*, 845 S.W.2d 551, 552 (Mo. banc 1993).

On April 5, 1999, the plaintiffs filed their Petition for Declaratory Judgment and Injunctive Relief. L.F. at 5. They alleged that the City's Ordinance 2403 was invalid because the form of the ordinance was allegedly in violation of the City

Charter. L.F. at 7-8. On April 22, 1999, the plaintiffs filed an amended petition in which they reasserted their previous claims and added further claims that Ordinance 2403 violated the City Charter and the Missouri and United States constitutions. L.F. at 13.

On April 5, 2000, the plaintiffs filed a second amended petition in eight counts, omitting their federal constitutional claims. L.F. at 28. Count I contained general allegations and did not pray for any relief. L.F. at 28-30.

Counts II and IV alleged that Ordinance 2403 created an indebtedness of the City and that, under the Missouri Constitution, the ordinance was required to be passed by a four-sevenths majority rather than a simple majority. L.F. at 30, 36. Count III similarly alleged that Ordinance 2465 evidenced an indebtedness that was required to be approved by a four-sevenths majority vote. L.F. at 34. The trial court entered summary judgment in favor of the City on these counts, finding that there was no indebtedness because "any payments would be contingent upon annual appropriations by the Defendant." L.F. at 367.

Count V of the second amended petition alleged that Ordinance 2403 was invalid on the asserted theory that it contained more than one subject and that the alleged multiple subjects were not clearly expressed in the ordinance's title. L.F. at 37. The trial court entered summary judgment in favor of the plaintiffs on this claim. L.F. at 367.

Count VI alleged that the plaintiffs sought an award of attorney fees under the Hancock Amendment. L.F. at 41. The trial court entered summary judgment in favor of the City on this claim "as no violation of the Hancock Amendment occurred here." L.F. at 367.

Count VII asserted that Ordinance 2403 was void on the theory that the City lacked the power to tax hotels, motels, or restaurants. L.F. at 41-42. The trial court entered summary judgment in favor of the City on this count. L.F. at 367.

Count VIII alleged that Ordinance 2403 was not a valid emergency ordinance under the City Charter. L.F. at 42. The trial court entered summary judgment in favor of the City on this claim, finding that the ordinance was properly enacted as an emergency ordinance. L.F. at 367.

Having found in favor of the plaintiffs on Count V, the trial court enjoined the City from enforcing the increased portion of the tax amended by Ordinance 2403: "[The] Defendant is hereby enjoined from collecting the 'new' Section 15-397 tax as it is void. Execution of this judgment is stayed pending the outcome of any appeal taken in this matter." L.F. at 368.

On October 16, 2000, the City filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District. L.F. at 369. On November 3, 2000, the plaintiffs filed a document captioned, "Motion for New Trial and Rehearing or in the Alternative, Motion to Amend the Judgment or in the Alternative, Motion to

Reopen the Case and Amend Findings of Fact and Law or Make New Findings and Enter a New Judgment in Conformity Herewith." L.F. at 375. On November 13, 2000, the trial court signed an order denying the motion. L.F. at 388. The order was filed on November 22, 2000. L.F. at 388. On December 1, 2000, the plaintiffs filed a notice of appeal. L.F. at 389.

On December 11, 2000, the court of appeals sustained the City's motions to consolidate the City's appeal with the plaintiffs' appeal and to expedite this case because of the significant public issues involved. After opinion by the court of appeals, this Court sustained the City's application for transfer.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THE THEORY THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION AND THE JUDGMENT SHOULD BE REVERSED IN PART IN THAT (A) BY ITS TERMS, SECTION 3.14 DOES NOT APPLY TO ORDINANCES THAT REVISE EXISTING ORDINANCES AND THE UNDISPUTED FACTS SHOW THAT ORDINANCE 2403 REVISES THE EXISTING ORDINANCE, (B) ORDINANCE 2403 DOES NOT VIOLATE THE SINGLE SUBJECT/CLEAR TITLE PROVISION EMBODIED IN SECTION 3.14 BECAUSE ALL OF THE MATTERS IN ORDINANCE 2403 RELATE TO THE SAME SUBJECT OF A LICENSE TAX AND THE TITLE OF THE ORDINANCE CLEARLY EXPRESSES THE SUBJECT, AND (C) ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION APPLIES ONLY TO LEGISLATION ENACTED BY THE GENERAL ASSEMBLY AND NOT TO LOCAL ORDINANCES.

C.C. Dillon Co. v. City of Eureka, 12 S.W.3d 322 (Mo. banc 2000).

Mid-State Distributing Co. v. City of Columbia, 617 S.W.2d 419 (Mo. App. 1981).

Ruggeri v. City of St. Louis, 441 S.W.2d 361 (Mo. 1969).

508 Chestnut, Inc. v. City of St. Louis, 389 S.W.2d 823 (Mo. 1965).

II. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THE THEORY THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION AND THE JUDGMENT SHOULD BE REVERSED IN PART BECAUSE THE PLAINTIFFS MADE NO SHOWING TO NEGATE THE CITY'S ASSERTED AFFIRMATIVE DEFENSE OF ESTOPPEL AND THE UNDISPUTED FACTS SHOW THAT THE PLAINTIFFS ARE ESTOPPED TO ASSERT THE INVALIDITY OF ORDINANCE 2403 IN THAT THE CITY RELIED ON THE PLAINTIFFS' SUPPORT, CONCURRENCE, AND ENCOURAGEMENT IN ENACTING THE ORDINANCE.

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,

854 S.W.2d 371 (Mo. banc 1993).

McCain v. Washington, 990 S.W.2d 685 (Mo. App. 1999).

Rule 74.04.

ARGUMENT

The City of Cape Girardeau respectfully suggests that this Court should reverse the judgment of the trial court because, in addition to being plainly incorrect, it's rationale (and that of the Missouri Court of Appeals in this case) would render invalid many municipal ordinances throughout this state as well as numerous state statutes. In reaching the erroneous determination that Ordinance 2403 should be declared invalid solely because of the content of its title, the trial court (and the court of appeals) ignored the standards applicable to determining this issue, as well as the numerous prior decisions of this Court showing that the ordinance fully complies with the applicable standards. The judgment entered against the City is palpably inconsistent with the law of this state.

In the court of appeals, the Missouri Municipal League and Southeast Missouri State University submitted an amicus brief in support of the City because of concern that the trial court's judgment marked a significant departure from Missouri case law, and because the judgment's implications for charter cities and any other parties involved in intergovernmental cooperation agreements could be significant. Missouri has 36 charter cities, and no less than 25 of these have provisions virtually identical to section 3.14 of Cape Girardeau's charter. The amicus brief explained that, if the court were to affirm the court below, the ruling would call into question the validity of countless ordinances already adopted by

these municipalities. This prospect is especially troubling for local governments enacting complex legislation related to taxation and redevelopment, as is the case here. The court of appeals, however, ignored the amicus brief and the concerns it raised.

In this Court, the Missouri Municipal League, the City of St. Louis, the City of Kansas City, and the Attorney General all filed suggestions in support of the City's application for transfer. The City respectfully suggests that this shows the significance and far-reaching effect that a ruling against the City might have for municipalities throughout the state, as well as for state legislation. In particular, Missouri's two largest cities have charter provisions effectively identical to the provision of Cape Girardeau's charter that is at issue in this case. If the Court were to declare Ordinance 2403 invalid for the reasons set forth by the plaintiffs, the floodgates would be open to similar challenges to a host of other enactments, with possible ramifications for millions of Missouri citizens. The Court should reject the plaintiffs' claims because they are meritless, and also because of the ill effects that a contrary ruling would have on this state.

I. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THE THEORY THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION AND THE JUDGMENT SHOULD BE REVERSED IN PART IN THAT (A) BY ITS TERMS, SECTION 3.14 DOES NOT APPLY TO ORDINANCES THAT REVISE EXISTING ORDINANCES AND THE UNDISPUTED FACTS SHOW THAT ORDINANCE 2403 REVISES THE EXISTING ORDINANCE, (B) ORDINANCE 2403 DOES NOT VIOLATE THE SINGLE SUBJECT/CLEAR TITLE PROVISION EMBODIED IN SECTION 3.14 BECAUSE ALL OF THE MATTERS IN ORDINANCE 2403 RELATE TO THE SAME SUBJECT OF A LICENSE TAX AND THE TITLE OF THE ORDINANCE CLEARLY EXPRESSES THE SUBJECT, AND (C) ARTICLE III, SECTION 23, OF THE MISSOURI CONSTITUTION APPLIES ONLY TO LEGISLATION ENACTED BY THE GENERAL ASSEMBLY AND NOT TO LOCAL ORDINANCES.

The judgment of the trial court must be reversed to the extent that it grants summary judgment to the plaintiffs. The undisputed facts show that Ordinance 2403 is fully in conformity with the single subject/clear title provision of the City Charter. The trial court properly rejected the plaintiffs' other arguments because,

under the settled law of this state, the City's ordinances were properly enacted. This Court should reverse the judgment of the trial court in part (to the extent that it finds in favor of the plaintiffs) and enter judgment in favor of the City on all claims.

A. Standard of review.

The trial court's entry of summary judgment is reviewed de novo. *Eisenberg v. Redd,* 38 S.W.3d 409, 410 (Mo. banc 2001). Appellate review of the grant of summary judgment is purely a question of law and, hence, uses the same criteria as imposed by the trial court in its initial determination of the propriety of the motion. *Huber v. Magna Bank,* 959 S.W.2d 812, 814 (Mo. App. 1997). Summary judgment is appropriate in cases in which (1) there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant. *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 380 (Mo. banc 1993); Rule 74.04(c)(3).

B. Ordinance 2403 need not be confined to a single subject.

In Count V of their second amended petition, the plaintiffs alleged that Ordinance 2403 violated Section 3.14 of the Cape Girardeau City Charter because "the ordinance itself contains more than one subject," and "the subjects are not clearly expressed in the title." L.F. at 38. The trial court erred in crediting this groundless contention for two reasons.

First, Section 3.14 provides: "No ordinance ***except those . . . codifying or revising existing ordinances*** shall contain more than one (1) subject, which shall be clearly expressed in its title." L.F. at 130 (emphasis added). On its face, Ordinance 2403 is "an ordinance amending Chapter 15 of the City Code" of ordinances, specifically Ordinance Code Section 15-397. L.F. at 115. The ordinance therefore falls within Section 3.14's exception for ordinances that revise existing ordinances. Contrary to the plaintiffs' assertion, Ordinance 2403 need not contain only one subject, or express the entirety of its subject matter within its title.

In construing Missouri legislative enactments, words and phrases are given their plain and ordinary meaning, and this meaning is generally derived from the dictionary. *Akers v. Warson Garden Apartments*, 961 S.W.2d 50, 53 (Mo. banc 1998); *Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 809 (Mo. banc 1998); *see* § 1.090, RSMo. According to both legal and standard dictionaries, "amend" and "revise" are synonymous terms. Black's Law Dictionary says that the meaning of "amend" includes to "change, correct, revise." Black's Law Dictionary 80 (6th ed. 1990). The same source reveals that "revise" means to "go over a thing for the purpose of amending, correcting, rearranging, or otherwise improving it." Id. at 1321. According to Webster, the meaning of "amend" includes "to change or revise (a law, etc.)." Webster's New World Dictionary 19

(2d college ed. 1984). Webster says that "revise" means "to change or amend." Id. at 512.

It is apparent that "revising existing ordinances," within the meaning of the City Charter, means changing or amending them. Thus, because Ordinance 2403 explicitly revises, changes, and amends an existing ordinance, it need not be confined to a single subject. The trial court's ruling in favor of the plaintiffs should be reversed because Ordinance 2403 was enacted for the purpose of revising an existing ordinance. Thus, the single subject/clear title provision of the City Charter was inapplicable.

C. Ordinance 2403 pertains to a single subject clearly expressed in its title.

Even if Ordinance 2403 were required to contain only one subject clearly expressed in its title, it still would not violate Section 3.14 of the City Charter. The standards for determining the sufficiency of the title of an ordinance are the same ones used in determining the sufficiency of the title of a state statute. *See Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n,* 973 S.W.2d 851, 861-62 (Mo. banc 1998); Mo. Const., art. III, § 23. The object of the requirement that a bill contain a single subject "clearly expressed" in its title "is that the title, like a guideboard, indicate the general contents of the bill, and contain but one general

subject, which might be expressed in a few or greater number of words." *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 828 (Mo. 1965).

"The evil to be avoided is imposition upon the members of the legislature and interested people." *Id*. By requiring an honest title, one that is not designed as a cover, "the legislators will not be misled into overlooking or carelessly or unintentionally voting for vicious and incongruous legislation, and interested people will be notified of the subjects of legislation being considered in order to be heard thereon." *Id*.

1. Ordinance 2403 contains a single subject.

Ordinance 2403 is titled:

> AN ORDINANCE AMENDING CHAPTER 15 OF THE CITY CODE INCREASING AND EXTENDING THE HOTEL/MOTEL/RESTAURANT LICENSE TAX AND CALLING AN ELECTION IN THE CITY OF CAPE GIRARDEAU, MISSOURI, ON THE QUESTION OF WHETHER TO APPROVE THOSE AMENDMENTS; DESIGNATING THE TIME OF HOLDING THE ELECTION; AUTHORIZING AND DIRECTING THE CITY CLERK TO GIVE NOTICE OF THE ELECTION.

L.F. at 115 (Appendix at A-2). The body of the ordinance pertains to a single subject: Chapter 15 of the city code, with its licensing tax for hotels, motels, and restaurants. That subject is clearly expressed in the title. Neither the legislators nor any person interested in the hotel/motel/restaurant business would be imposed upon, misled, deceived, or surprised by the enactment of Ordinance 2403 under this title.

The alleged additional "subjects" that the plaintiffs listed in their second amended petition are not distinct subjects, but provisions within the ordinance that relate to the ordinance's general subject matter. Ordinance 2403 includes provisions on the same subject noted in its title, "the hotel/motel/restaurant license tax," by describing the amount of the tax increase; the duration of the extension of the tax; the proposed use of the tax proceeds to help fund the construction of a cultural and performing arts center; conditioning this use of the tax proceeds on the execution of an intergovernmental agreement for the project to be funded by the tax; and calling for an election pursuant to the City Charter to approve the tax increase. The title of the ordinance is an honest title, not designed as a cover for vicious or incongruous legislation.

If the plaintiffs' claim that the above provisions are distinct "subjects" were accepted, the City would be proscribed from enacting any ordinances except those that have titles repeating word for word the entire contents of the ordinances.

Under the plaintiffs' theory, every paragraph of Ordinance 2403 should be a separate ordinance. Thus, the City would be required to enact a preliminary ordinance stating its intent to increase and extend the licensing tax, as well as a separate ordinance stating the amount of the tax increase, as well as another ordinance extending the duration of the tax, as well as another ordinance describing the use of the tax funds, and so on. Neither the City's charter nor Missouri statutes require the city to jump through so many hoops to pass a simple one-percent tax increase.

In the trial court, in arguing that Ordinance 2403 contains more than one subject, the plaintiffs relied principally on *Hammerschmidt v. Boone County,* 877 S.W.2d 98 (Mo. banc 1994), and *ACI Plastics, Inc. v. City of St. Louis*, 724 S.W.2d 513 (Mo. banc 1987). The City agrees that these cases set forth the appropriate standards for reviewing the plaintiffs' claims, but both cases are readily distinguishable from the facts of this case.

As *Hammerschmidt* explains, any doubts as to the procedural and substantive validity of a legislative act must be resolved in favor of validity. 877 S.W.2d at 102. Attacks against legislative action founded on procedural limitations are not favored, and such limitations are to be interpreted liberally, so that such an attack must fail unless the legislation ***clearly*** and ***undoubtedly*** violates the limitation. *Id.* This Court has consistently attempted to avoid an interpretation

of the single-subject rule that will "limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law." *Id.*

Thus, the words "one subject" must be broadly read, and so long as "the matter is germane, connected and congruous," the law does not violate the single-subject rule. *Id.* The test to determine whether a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith, or are incidents or means to accomplish its purpose. *Id.* A "subject," therefore, includes ***all*** matters that fall within or reasonably relate to the general core purpose of the proposed legislation. *Id.*

The Court recently reaffirmed these precepts in *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000). "The test to determine if a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose." *Id.* at 328 (citing *Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997). This test does not concern the relationship between individual provisions, but between the individual provision and the subject as expressed in the title. *Id.* (citing *Fust v. Attorney General*, 947 S.W.2d 424, 428 (Mo. banc 1997).

In *C.C. Dillon*, the appellant argued that a bill had multiple subjects. The title of the bill was, "An Act to repeal sections 43.030, 226.040 and 226.140,

RSMo 1994, and sections 71.288 and 226.005, RSMo Supp. 1997, relating to transportation, and to enact in lieu thereof seven new sections relating to the same subject." *Id.* at 329. The seven new sections included certain billboard regulations. *Id.* Despite the arguments to the contrary, the Court held that "billboards fairly relate to, or are naturally connected with, transportation." *Id.* Thus, the act did not violate the single-subject requirement of the Missouri Constitution.

Similarly, *C.C. Dillon* holds that the title of an enactment must "indicate in a general way the kind of legislation that was being enacted." *Id.* (quoting *Fust*, 947 S.W.2d at 429). "The title to a bill need only indicate the general contents of the act." *Id.* (quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 6 (Mo. banc 1984)). The title need not describe every detail contained in the bill. *Id.* (quoting *Fust*, 947 S.W.2d at 429). Thus, the plaintiffs' claim in this case that every minute provision of Ordinance 2403 must be set forth in its title must be rejected.

Pursuant to these standards, *Hammerschmidt* holds that a statute violates the single-subject rule of the Missouri Constitution if it contains provisions amending election statutes ***and*** creating a statute to permit a constitutional form of county government. 877 S.W.2d at 103. Similarly, in *ACI*, an ordinance was held to violate the single-subject requirement of a city charter in that it dealt with two

entirely unrelated revenue measures: "The sales tax and the employer's fee are completely different subjects." 724 S.W.2d at 516.

The present case, however, is readily distinguishable. Ordinance 2403 only includes provisions relating to the one subject noted in its title, "the hotel/motel/restaurant license tax," by describing an increase in the tax, its duration, the proposed use of the tax proceeds, and calling for an election to approve the tax increase. Ordinance 2403 does not contain any provisions unrelated to the hotel/motel/restaurant license tax.

Similar enactments have always been upheld by Missouri courts. In *Fust v. Attorney General,* 947 S.W.2d 424, 428 (Mo. banc 1997), the Court rejected an argument all but identical to the one raised by the plaintiffs in this case: "Appellants argue that HB 700 could not have one subject because this bill has numerous components: provisions relating to regulation of liability insurance carriers; provisions modifying tort liability for manufacturers; a provision relating to pre-judgment interest; provisions relating to the procedure in the trials involving cases of punitive damages; and a provision that establishes the tort victims' compensation fund." The Court noted, however, that the single-subject test is not whether individual provisions of a bill relate to ***each other***, but whether they fairly relate to the general subject of the bill. *Id.*

The Court held in *Fust* that the seemingly disparate provisions properly related to the same subject: "All sections of this particular bill purport to do the same thing – promote compensation for certain tort victims. Unquestionably, this object may be accomplished by multiple means. . . . The topics are not only naturally and reasonably related to the bill's stated subject but are inextricably intertwined as elements of our tort liability system." *Id.*

To the same effect is *Corvera Abatement Technologies, Inc. v. Air Conservation Comm'n,* 973 S.W.2d 851, 861 (Mo. banc 1998), in which a single enactment (1) created the Missouri Emergency Response Commission to facilitate preparation and implementation of plans to cope with the release of hazardous substances, (2) established procedures and penalties relating to the ownership and use of underground storage tanks, and (3) enacted provisions concerning asbestos abatement projects. The Court held that "all the provisions of the bill fall within the subject of environmental control . . . . By regulating potential environmental hazards, the provisions of CCSHB 77 fairly relate to, have a natural connection with, and are a means of accomplishing environmental control." *Id.* at 862.

Similarly, in this case, the provisions of Ordinance 2403 relate to the same subject – the hotel/motel/restaurant license tax. Whether the provisions relate to each other is irrelevant. *Fust,* 947 S.W.2d at 428. Nevertheless, in this case, all of

the provisions of Ordinance 2403 relate to each other as the single subject of the ordinance.

In the trial court, the plaintiffs asserted that the provisions relating to what the City plans to do with the revenue from the tax are unrelated to the tax itself. This argument is foreclosed by *Akin v. Director of Revenue*, 934 S.W.2d 295, 301 (Mo. banc 1996), in which the subject of the bill in question was education. The plaintiff tax protesters complained that the bill contained a tax increase in addition to provisions relating to education matters. *Id.* The tax increase, however, was a means of funding the education programs provided for elsewhere in the statute. *Id.* Citing *Hammerschmidt*, the Court stated the provisions concerned but a single subject. *Id.*

Akin shows that a bill designed to advance a particular purpose may contain a tax increase without violating the single-subject rule. Logically, then, a tax measure may contain provisions stating how the resulting revenues are to be applied. In both cases, there is one subject to which all provisions are related.

2. The title of Ordinance 2403 expresses its subject.

Missouri courts have consistently rejected claims similar to those advanced by the plaintiffs in the context of city ordinances. In *Mid-State Distributing Co. v. City of Columbia*, 617 S.W.2d 419, 421-22 (Mo. App. 1981), an ordinance of the City of Columbia established a refund value of five cents each upon certain

beverage containers sold in the City of Columbia, and required the retailer to pay the same amount upon receipt of the containers. Manufacturers and distributors in their turn were required pay the refund value for the containers. The ordinance contemplated, but did not require, the collection of a five-cent deposit from the consumer upon each container, which was to be refunded upon return of the container. The declared purpose of the ordinance was to reduce littering and to promote recycling and reuse of empty beverage containers.

In *Mid-State Distributing*, the Columbia city charter provided (like Cape Girardeau's charter in this case), "No bills shall relate to more than one subject, which shall be clearly expressed in its title." *Id.* at 422. The Missouri Court of Appeals, Western District, rejected a claim almost identical to that raised by the plaintiffs in this case: "The title reads: 'An ordinance amending Chapter 10 by adding and enacting a new Article XIV relating to beverage containers; and fixing the time when this ordinance shall become effective.' The title is thus indicative of the subject of the ordinance, and meets the standard of the above-quoted [charter provision]." *Id.* In this case, as in *Mid-State Distributing*, the ordinance at issue relates to only one subject that is clearly expressed in its title.

Similarly, in *Ruggeri v. City of St. Louis*, 441 S.W.2d 361, 362 (Mo. 1969), an ordinance established a convention and tourism bureau for the city and, among other things, imposed an additional tax on the gross receipts of hotels, motels, and

restaurants. The charter of the city provided "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title." *Id*. at 363. The Court rejected the claim "that the title embraces four subjects unrelated to each other: the establishment of a Bureau, the levy of a tax, the establishment of a fund, and appropriation of monies. We agree with defendants' position that the ordinance deals with but one subject, the encouragement of conventions and tourism, and that each of the four 'subjects' is in reality but a separate facet of the prime subject--a scheme, a plan, a design to promote conventions and tourism." *Id*. This case is indistinguishable from *Ruggeri*.

In *508 Chestnut*, this Court rejected a claim that a St. Louis ordinance lacked a clear title. The ***1400-word*** title of the ordinance stated, in relevant part:

> An Ordinance licensing and regulating the following business avocations, permits, professions, trades, calling[s?] as follows: [here 217 businesses are listed, including 'Hotels and Motels'].
>
> Establishing a procedure for the issuing of licenses, requiring all delinquent taxes, licenses, permits due or past due to be paid as a condition precedent to the issuance of such licenses; requiring the license collector

> to administer such ordinance; establishing the Board of Tax Appeals; providing and prescribing the procedure and powers of the Board of Tax Appeals; requiring bonds for certain specified licenses, and repealing [certain numbered and entitled chapters of the Revised Code] and containing a penalty clause and a severability clause.

Id. at 827 (bracketed material in original).

The ordinance provided that every corporation engaged in any business referred to in the ordinance must procure and pay for a license from the city, with the fee to be in the respective amounts set out in the ordinance. *Id.* Each separate business was dealt with in a separately numbered subsection. *Id.* Some license fees were imposed in fixed amounts, while others were based on annual gross receipts, with a minimum annual fee. *Id.* The tax on hotels was two percent of the gross daily rental receipts from transient guests. *Id.*

The ordinance contained a section defining such terms as "transient guest," "hotel," and "motel." *Id.* at 828. It created a duty on the part of every hotel or motel owner to file with the city comptroller a sworn statement of the gross daily receipts from transient guests from the operation of the hotel or motel every six months. *Id.* The comptroller was required to examine the accuracy of the statements and certify to the license collector the amount of tax due. *Id.* The

license collector was then required to notify the taxpayer of the certification, and the taxpayer was to pay the tax within five days. *Id.*

As in this case, the plaintiff in *508 Chestnut* asserted that the ordinance did not contain a title that clearly expressed the subject of the ordinance. The Court easily rejected this claim, noting that the object of St. Louis' clear-title provision (like Article III, section 23, of the Missouri Constitution) is that the title merely indicate the general contents of the bill. The title may be expressed in a few words, but where it descends to particulars, the particulars stated become the subject of the act, which must conform to the title as expressed by the particulars: "Where the title goes into such detail as would reasonably lead to the belief that nothing was included except that which is specified then any matter not specified is not within the title. Any such matter beyond the title is void." *Id.* (quoting *State ex rel. Fire Dist. of Lemay v. Smith*, 353 Mo. 807, 184 S.W.2d 593, 596 (Mo. banc 1945)).

The Court held that the ordinance in *508 Chestnut* did not contravene these guiding principles. The Court held that no one would be imposed upon, misled, deceived, or surprised by the enactment of the hotel/motel tax provisions under the ordinance's title: "It is an honest title, revealing the one and only general subject of the ordinance–the licensing and regulating of specified businesses and professions, including hotels and motels. The licensing of hotels and motels is

germane to the subject. Every provision . . . is germane, that is, closely allied, fit and appropriate, and of a similar nature to the subject expressed in the title." *Id.*

In particular, the Court rejected a claim similar to one advanced in this case. Here, the plaintiffs claim that every provision of Ordinance 2403 is a separate subject that was required to be set forth in the title. This Court dismissed a similar claim in *508 Chestnut*: "In its reference to hotels and motels the title does not descend into particulars, and therefore its failure to include a reference to the sworn statements of receipts to be filed with the comptroller or the variance between the expiration dates of licenses granted to hotels and motels and those granted to other businesses, or other details, is not fatal to the ordinance." *Id.* Similarly, in this case, the details of Ordinance 2403 were not required to be listed verbatim in the title.

3. The opinion of the court of appeals was erroneous.

The opinion of the Missouri Court of Appeals in this case plainly overlooked and misinterpreted the law of this state. The opinion held that Ordinance 2403 was invalid on the erroneous theory that the title was required to set forth every provision of the ordinance:

> The title of Ordinance 2403 does not set forth in any way that if sufficient funds are committed by University and the State of Missouri to complete the "project" and if an

> agreement is entered between City and University, then the proceeds of the additional taxes "will" be used for a performing arts center, museum and associated cultural facilities. The title also does not discuss proceeds being used for the Convention and Visitor's Bureau. The title also fails to set forth in any way that if sufficient funds were not committed for the "project" by December 31, 2001, then the additional taxes derived by that date "shall" be used to reduce City's indebtedness "on the Show Me Center Bonds." The title is, therefore, underinclusive because certain provisions of the ordinance fall outside it. Accordingly, the subject of the ordinance is not clearly expressed in its title as required by section 3.14(a) of City's charter.

Opinion at 7-8.

The City respectfully suggests that the cases cited in its argument, above, are clear authority demonstrating that the judgment of the trial court must be reversed. The court of appeals ignored or misinterpreted these cases. Notably, the opinion of the court of appeals entirely overlooked *Akin*, *Mid-State Distributing*, and *Ruggeri*, despite the fact that these cases squarely on point were discussed at length in the

parties' briefs. The opinion cited *508 Chestnut* and *Corvera Abatement Technologies* only in a footnote and did not discuss them in connection with the sufficiency of the title of the ordinance at issue.

With a single exception, the cases mentioned in the court of appeals' discussion of the ordinance's title ***upheld*** enactments against claims similar to those advanced by the plaintiffs. *See C.C. Dillon*; *Fust*; *Missouri State Medical Ass'n. v. Dept. of Health*, 39 S.W.3d 837 (Mo. banc 2001); *National Solid Waste Management Ass'n. v. Director of Natural Resources*, 964 S.W.2d 818 (Mo. banc 1998). The lone exception is the readily distinguishable *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. banc 1998), the facts of which are not mentioned in the opinion, in which an enactment whose title labeled the act as "relating to certain incorporated and non-incorporated entities," without any further limitation, was held to be entirely uncertain and did not clearly express the scope of the act. There is no such claim in this case.

It is also apparent that the court of appeals erred in holding that an entire ordinance should be invalidated because of what it found to be a clear-title violation. This is in conflict with cases holding that only the offending portion of the enactment should be invalidated, including *Hammerschmidt* and *National Solid Waste Management. See City of St. Louis v. Breuer*, 223 S.W. 108, 111 (Mo. 1920). If the court had been correct in finding a clear title violation (which it was

not), the proper remedy would have been to hold that the ordinance was valid except as to the parts that made the title "underinclusive," Sections 7 and 8.

In sum, the opinion of the court of appeals ignored relevant authority and cited only cases that did not support its holding. It ignored the heavy burden Missouri law places on plaintiffs seeking to invalidate legislation on purely formal grounds and failed to mention the strong presumption of validity. The opinion ignored the amicus brief filed by the Missouri Municipal League raising grave concerns for the validity of "countless" other city ordinances if the trial court's judgment were to be affirmed. This Court properly granted transfer because the opinion of the court of appeals was directly contrary to the law. This Court should reach entirely the opposite conclusion from that of the court of appeals.

D. There is no constitutional violation.

The Court may note that the trial court's judgment alludes to Article III, Section 23, of the Missouri Constitution and states that Ordinance 2403 is "constitutionally void." L.F. at 367-68. This provision of the constitution provides that a bill in the General Assembly generally must have no more than one subject which shall be clearly expressed in its title. It has long been settled that this provision has no application to local ordinances. *City of Tarkio v. Cook*, 120 Mo. 1, 25 S.W. 202 (1894); *City of St. Louis v. Liessing*, 190 Mo. 464, 89 S.W. 611 (1905); *Denneny v. Silvey*, 302 Mo. 665, 259 S.W. 422 (1924).

The plaintiffs never alleged that Ordinance 2403 was invalid on the basis of Article III, Section 23. Rather, they relied on the similar provisions of Section 3.14 of the City Charter. L.F. at 37. Even if the ordinance violated the charter provision (which it plainly does not), there would be no constitutional violation. *Kirkwood v. City of St. Louis*, 351 S.W.2d 781, 786 (Mo. 1961). In addition to the foregoing grounds, the judgment of the trial court must be reversed to the extent that it states that a local ordinance can violate Article III, Section 23.

E. The result of the election called for in Ordinance 2403 is valid.

Finally, the plaintiffs cannot prevail on their claim that the election held to approve Ordinance 2403 is invalid for three reasons. First, as explained exhaustively above, the ordinance itself is valid. The plaintiffs have only alleged that the election should be invalidated because, they declare, the ordinance calling the election should be held to be void. Because the ordinance is demonstrably valid, the plaintiffs' only argument against the election must be rejected.

Second, as noted above, the appropriate remedy if the Court were to find a clear-title violation would be to sever the portions of the ordinance that the Court found to be beyond the scope of the title. The court of appeals erroneously found the title of Ordinance 2403 to be underinclusive as to Articles 7 and 8, relating to how the City planned to use the proceeds of the tax, subject to annual appropriation. These provisions plainly relate to the tax that is the subject of the

ordinance, but if the Court were to conclude to the contrary, the appropriate remedy would be to sever Articles 7 and 8 rather than to invalidate the entire ordinance. See *Hammerschmidt; National Solid Waste Management; City of St. Louis v. Breuer*. Articles 3 through 6 of the ordinance, relating to calling an election on the tax increase, are both undeniably related to the tax and explicitly recited in the title of the ordinance. No reasonable person could argue that these articles violate the single-subject/clear-title provision of the City Charter. These provisions should be allowed to stand regardless of whether the Court were to find any issues with Articles 7 and 8.

Third, section 115.577 of the Missouri Revised Statutes requires that any action brought to contest an election must be brought within thirty days after the official announcement of the election result. The plaintiffs filed this action on April 5, 1999, several months after the November, 1998, election in which the City's voters approved the ordinance. Their challenge to the election was not timely filed. *Clark v. City of Trenton*, 591 S.W.2d 257, 259-60 (Mo. App. 1979); § 115.577, RSMo. Their claim that the election is void therefore must fail.

F. The trial court properly rejected the plaintiffs' other claims.

Other than the ruling on the plaintiffs' Count V, the remainder of the trial court's judgment was correctly in favor of the City. These claims will be briefly addressed below.

1. A four-sevenths vote was not required.

The common theme of Counts II, III, and IV of the second amended petition is the plaintiffs' mistaken theory that the tax increase in Ordinance 2403 and the agreement authorized in Ordinance 2465 were required to be approved by a four-sevenths vote of the people. This argument is patently incorrect and rebutted by the undisputed facts. The trial court properly entered summary judgment in favor of the City on these claims.

The plaintiffs premised their four-sevenths theory on Article VI, Section 26(b), of the Missouri Constitution, which states that under certain limited circumstances a city may only "become indebted" with voter approval. The plaintiffs incorrectly contended that Ordinance 2403 and the agreement authorized in Ordinance 2465 represent an indebtedness incurred by the City. "Indebtedness," in this context, is "an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed." *Knowlton v. Ripley County Memorial Hosp.*, 743 S.W.2d 132, 136 (Mo. App. 1988) (quoting *Saleno v. City of Neosho*, 127 Mo. 627, 30 S.W. 190, 192 (1895)). Thus, where liability under an agreement is contingent, there is no indebtedness for the purposes of the Missouri Constitution.

Knowlton, 743 S.W.2d at 136-37; *St. Charles City-County Library Dist. v. St. Charles Library Building Corp.*, 627 S.W.2d 64, 68 (Mo. App. 1981).

This Court has explicitly recognized that there is no unconditional obligation where it is expressly provided that the commitment to pay shall be subject to appropriation. *New Liberty Medical & Hosp. Corp. v. E. F. Hutton & Co.,* 474 S.W.2d 1, 7 (Mo. banc 1971). Since the availability of appropriations is within the ***sole*** control of the government entity, this condition renders any "obligation" entirely optional and within its discretion. No legally enforceable obligation results. *Id.* (quoting *State ex rel. Thomson v. Giessel,* 72 N.W.2d 577 (Wis. 1955)).

By the plain terms of the agreement between the City and the University, any payments that may be made by the City would be "subject to annual appropriation by the City Council." L.F. at 137 (¶ 3). Similarly, Ordinance 2403 explicitly provides that the proceeds of the license tax will be "subject to annual appropriation by the City Council." L.F. at 117 (Article 7.) Because any payment on the part of the City would be contingent on the City Council approving an appropriation, there is no "indebtedness" as the plaintiffs suggest. *Knowlton,* 743 S.W.2d at 136-37; *St. Charles,* 627 S.W.2d at 68; *New Liberty,* 474 S.W.2d at 7.

Because there is no indebtedness, under the constitutional provision cited by the plaintiffs, no election was required to approve the agreement. See Mo. Const. art VI, § 26(b). In the trial court, the plaintiffs admitted that the tax increase in

Ordinance 2403 passed with a majority of fifty-three percent of the votes cast. L.F. at 92-93 (¶ 8), 224 (¶ 8). The super majority of four-sevenths in Article VI, Section 26(b), was not required because Ordinance 2403 did not result in any indebtedness. Because the undisputed facts show that the plaintiffs' four-sevenths argument was baseless, the trial court properly entered summary judgment in favor of the City on Counts II, III, and IV of the second amended petition.

2. The plaintiffs were not entitled to their attorney fees.

In Count VI their second amended petition, the plaintiffs erroneously alleged that they were entitled to their attorney fees incurred in maintaining this suit under Article X, Sections 22 and 23, of the Missouri Constitution. Article X, Section 22 (known as the Hancock Amendment) prohibits Missouri counties and other political subdivisions from increasing the current levy of an existing tax, license, or fee "without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon."

The Hancock Amendment is inapplicable to this case. The plaintiffs specifically alleged that the increase and extension of the tax mentioned in Ordinance 2403 was in fact approved by the voters of the City of Cape Girardeau on November 3, 1998. L.F. at 92-93 (¶ 8), 224 (¶ 8). As demonstrated above, their four-sevenths argument is invalid. Thus, there can be no violation of the Hancock Amendment. Article X, Section 23, of the Missouri Constitution grants any

taxpayer the right to bring suit to enforce the provisions of the Hancock Amendment and to collect reasonable attorney fees incurred in maintaining the suit only "if the suit is sustained." The plaintiffs' Hancock challenge to Ordinance 2403, however, was not sustainable, and it was not sustained. The City was entitled to summary judgment on the plaintiffs' claim for attorney fees under the Hancock Amendment.

3. The City has the power to tax hotels and motels.

In Count VII, the plaintiffs alleged that Ordinance 2403 was illegal and invalid on the theory that it violated Article X, Section 10.1, of the City Charter. This allegation was groundless. Section 10.1 of the City Charter sets forth the "Objects of Licensing, Taxation, and Regulation" in the City of Cape Girardeau. L.F. at 132. The section empowers the city council to enact ordinances for the licensing, taxation, and regulation of all businesses and occupations "enumerated by the statutes of this state now or hereafter applicable to constitutional charter cities, or cities of the third or fourth class, or of any population group." L.F. at 132.

Missouri statutes expressly permit the legislative bodies of third class cities, fourth class cities, and certain constitutional charter cities to regulate, license, and levy and collect license taxes on hotels and restaurants. §§ 94.110, 94.270, 92.045, RSMo. Thus, under the plain language of Section 10.1 of the City Charter, the city

council had the power to enact an ordinance "increasing and extending the hotel/motel/restaurant license tax" when it enacted Ordinance 2403.

The plaintiffs also alleged that Ordinance 2403 violated Section 71.610 of the Missouri Revised Statutes, which prohibits Missouri municipal corporations from imposing a license tax "upon any business . . . unless such business . . . is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute." According to the plaintiffs, Ordinance 2403 offended the statute because "hotels/motels and restaurants are not specifically named in the City Charter and . . . there is no applicable statute conferring the power to tax hotels/motels and restaurants by a license tax such as that sought to be imposed by the said ordinance." L.F. at 41 (¶ 33.)

This argument is baseless. The City Charter incorporates by reference Missouri statutes that empower city councils to levy and collect license taxes on hotels and restaurants. The ordinance is therefore valid. L.F. at 302-03; *Erb Industrial Equipment Company, Inc. v. City of Cape Girardeau*, 845 S.W.2d 551 (Mo. banc 1993); *General Installation Co. v. University City*, 379 S.W.2d 601, 604 (Mo. banc 1964).

Erb also disposes of the plaintiffs' claim that the City may tax hotels but not motels. Section 94.110 permits the taxation of an extraordinarily exhaustive list of businesses "and all other vocations and business whatsoever, and all others

pursuing like occupations." This Court specifically held in *Erb* that, pursuant to the incorporation by reference of section 94.110 into the City Charter, that the City is permitted to tax merchants of ***any*** kind. 845 S.W.2d at 552. Motels, as much as hotels and restaurants, certainly fall within this grant of authority.

Furthermore, a motel is a form of hotel. According to Webster, a "motel" is "a hotel for motorists," and the word is derived by joining the words "motorist" and "hotel." *See* Webster's New World Dictionary 392 (2d college ed. 1984). The explicit grant of authority to tax hotels extends to all hotels, including motels. The trial court properly entered summary judgment in favor of the City on Count VII.

4. Ordinance 2403 does not violate the City Charter's provision for emergency measures.

In Count VIII, the plaintiffs alleged that Ordinance 2403 violated Section 3.15 of the City Charter (titled "Emergency Measures") on the theory that the ordinance did not state the reasons for its designations as an emergency ordinance. L.F. at 42. This contention was properly rejected. Included in Section 3.15's list of events warranting an emergency procedure is "calling an election or providing for the submission of a proposal to the people." L.F. at 131. The emergency invoked in the passage of Ordinance 2403 was "calling an election and providing for the submission of [the proposed ordinance] to the people." L.F. at 117-18. Ordinance 2403, therefore, does not violate Section 3.15 of the city charter because

it is an emergency ordinance as defined by the City Charter. The trial court properly entered summary judgment in favor of the City on this claim.

5. Ordinance 2403 does not constitute double taxation.

In paragraph 35 of their second amended petition, the plaintiffs alleged that Ordinance 2403 was "void and invalid and unconstitutional as comprising double taxation in that there is already imposed upon the businesses in question . . . a license tax on the same taxable incident of gross receipts pursuant to Section 15-1 to Section 15-93." This statement is incorrect, both factually and legally.

Double taxation occurs when two separate taxes are placed on the same item, for the same purpose, by the same taxing authority, during the same taxing period, and the subject of taxation contributes twice to the same burden while other subjects of the same class are required to contribute only once. *GTE Automatic Elec. v. Director of Revenue,* 780 S.W.2d 49, 53 (Mo. banc 1989); *State v. Hallenberg-Wagner Motor Co.,* 108 S.W.2d 398 (Mo. 1937); 84 C.J.S. Taxation § 39 (1954). Double taxation is not unconstitutional. *GTE Automatic Elec.,* 780 S.W.2d at 53; 84 C.J.S. Taxation §§ 39-40 (1954). Where there is a clearly expressed legislative intent to impose a double tax, that intent will prevail. *GTE Automatic Elec.,* 780 S.W.2d at 53; 84 C.J.S. Taxation § 40 (1954).

The tax imposed by Ordinance 2403 is not a double tax. It is imposed uniformly on all hotels, motels, and restaurants in the City. In addition, there is no

other ordinance contained in the City's Code of Ordinances that imposes a license tax on hotels, motels, and restaurants for the purpose of raising revenue to construct a performing arts center and related cultural facilities. L.F. at 96 (¶ 22), 247 (¶ 22). Moreover, even if the tax could be deemed a double tax, it would not be illegal. The city council clearly expressed its intent within Article 2 of Ordinance 2403 that the license tax "shall be in addition to all other license taxes which are applicable to hotels, motels, and restaurants." L.F. at 116. That intent must prevail. *GTE Automatic Elec.*, 780 S.W.2d at 53; 84 C.J.S. Taxation § 40 (1954). The trial court properly rejected the plaintiffs' double-taxation claim.

6. Ordinance 2403 does not impose a sales tax.

The plaintiffs moved for summary judgment "upon one of the counts they present in this cause" on the theory that Ordinance 2403 imposed a sales tax rather than a license tax. L.F. at 168, 169. According to the plaintiffs, the ordinance was illegal and invalid because it violated section 94.510 of the Missouri Revised Statutes, part of the City Sales Tax Act. This baseless argument was properly rejected. Ordinance 2403 explicitly relates to a license tax, not a sales tax.

In *Suzy's Bar & Grill, Inc. v. Kansas City*, 580 S.W.2d 259, 260 (Mo. banc 1979), this Court explained the distinction between a sales tax and a gross-receipts license tax. The distinction lies in the difference between the kinds of receipts upon which the tax is assessed. A gross-receipts license tax starts with the revenue

received by the licensee as a base, not the basic charge made to the customer by the merchant, and assesses a tax equal to a percentage of those revenues without regard to the makeup of the revenue and without restrictions to the percentage stated in the taxing ordinance. *Id.* at 262. On the other hand, a sales tax is assessed against the taxpayer as a percentage of the price of the goods. *Id.* at 263.

In *Suzy's Bar & Grill*, the City of Kansas City imposed a tax on cafes, cafeterias, lunchrooms, and restaurants within the city's corporate limits. The city distributed a tax chart to those businesses to be used with respect to the tax imposed. *Id.* at 260. The chart demonstrated that the tax was imposed on the "sticker price" of menu items, not the gross receipts of the restaurant. *Id.* at 262-63. Because the tax in Suzy's Bar & Grill was assessed as a percentage of the basic price of the goods, the Court determined that it was a sales tax rather than a license tax. *Id.* Because that sales tax was not submitted to a vote of the people, it was invalidated. *Id.*

Similarly, in *Anderson v. City of Joplin*, 646 S.W.2d 727 (Mo. 1983), the City of Joplin passed an ordinance requiring innkeepers to pay a tax. As in *Suzy's Bar & Grill*, the city's director of finance mailed to all owners of hotels, motels, and tourist courts a chart that listed room rents from $1.35 to $100 and calculated a percent room tax on the basic charge for each room rent. *Id.* at 728. As in *Suzy's Bar and Grill*, the chart demonstrated that the license tax was not imposed on gross

receipts, but on the "sticker price" of the room. *Id.* This Court concluded that the tax was imposed on the basic charge that the customer paid to the merchant and that the tax in *Anderson* was in reality a sales tax rather than a license tax. *Id.* The Court invalidated the tax because it had not been submitted to a vote of the people. *Id.*

In contrast to the ordinances at issue in *Anderson* and *Suzy's Bar & Grill,* the City's ordinance does not impose a sales tax. Ordinance 2403 explicitly taxes "gross receipts." L.F. at 257. Section 15-396 of the City Code, entitled "Definitions and rules of construction," provides the definition of "gross receipts" for the purposes of section 15-397: "*Gross receipts* is based upon the applicable revenue received by the licensee and not on the basic charge made to the customer by the licensee. For example, gross receipts shall be construed to include all sales taxes." L.F. at 257. Thus, the City's tax does not suffer the infirmity found in *Anderson* and *Suzy's Bar & Grill*. Ordinance 2403 creates a license tax, not a sales tax. The trial court properly rejected the plaintiffs baseless claim to the contrary.

G. The Court should enter judgment in favor of the City.

In the interest of laying litigation to rest, Rule 84.14 permits the appellate court to give such judgment as the trial court ought to have given. *Oliver v. State Tax Comm'n,* 37 S.W.3d 243, 253 (Mo. banc 2001); *Redpath v. Missouri Highway & Transp. Comm'n,* 14 S.W.3d 34, 41 (Mo. App. 1999). In this case, the

undisputed facts show that the plaintiffs are not entitled to prevail on their claims and that the City is entitled to summary judgment. No useful purpose would be served by prolonging this litigation. To the contrary, the public interest would be served by concluding this matter as soon as possible. The Court should reverse the judgment of the trial court to the extent that it was in favor of the plaintiffs and enter judgment in favor of the City on all claims.

II. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS ON THEIR CLAIM THAT ORDINANCE 2403 VIOLATED SECTION 3.14 OF THE CITY CHARTER AND THE JUDGMENT SHOULD BE REVERSED IN PART BECAUSE THE PLAINTIFFS MADE NO SHOWING TO NEGATE THE CITY'S ASSERTED AFFIRMATIVE DEFENSE OF ESTOPPEL AND THE UNDISPUTED FACTS SHOW THAT THE PLAINTIFFS ARE ESTOPPED TO ASSERT THE INVALIDITY OF ORDINANCE 2403 IN THAT THE CITY RELIED ON THE PLAINTIFFS' SUPPORT, CONCURRENCE, AND ENCOURAGEMENT IN ENACTING THE ORDINANCE.

As noted in Point I, above, the trial court erred in entering summary judgment in favor of the plaintiffs on Count V because the undisputed facts show that the City was entitled to judgment as a matter of law on this claim. Furthermore, the judgment in favor of the plaintiffs is defective because the plaintiffs made no effort to refute the affirmative defenses raised in the City's answer.

In order to obtain summary judgment, a plaintiff must establish that there is no genuine dispute as to those material facts upon which it would have had the burden of persuasion at trial. Where the defendant has raised an affirmative defense, a claimant's right to judgment depends just as much on the non-viability

of that affirmative defense as it does on the viability of the claimant's claim. It does not matter that the non-movant will bear the burden on this issue at trial. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 381 (Mo. banc 1993).

In this case, the plaintiffs cannot deny the propriety of the City's Ordinance 2403 in that they supported its passage, and their support was relied on by the City in enacting the ordinance. The undisputed facts show that Plaintiff James L. Drury, on behalf of Plaintiff Midamerica Hotels Corporation, wrote to the Mayor and City Council of the City in a letter dated August 17, 1998, expressing support "for the River Campus Project and the one percent tax initiative (Sec. 15-397)." L.F. at 276. It is undisputed that, in debating Ordinance 2403 in the City Council, it was noted "that a group of hotel owners sent a letter indicating they approve of the one percent increase in the hotel tax." L.F. at 326. The plaintiffs have never made any showing to negate the evidence showing the City's reliance on the plaintiffs' approval of Ordinance 2403.

Thus, the plaintiffs are estopped to assert their claims in this case. *See McCain v. Washington,* 990 S.W.2d 685, 689 (Mo. App. 1999). A claimant moving for summary judgment in the face of an affirmative defense has the burden to show the affirmative defense fails as a matter of law. *Id.* Because the plaintiffs

have failed to establish the non-viability of the City's affirmative defense, the plaintiffs were not entitled to summary judgment. *Id.*

CONCLUSION

The plaintiffs have failed to carry the high burden that the law places upon them in this case. This Court's cases, all of recent vintage, demonstrate that single-subject/clear title challenges to legislation are not favored, and that plaintiffs bear the substantial burden of showing that the legislation ***clearly*** and ***undoubtedly*** violates the limitation. *Hammerschmidt*, 877 S.W.2d at 102; *Corvera Abatement Technologies*, 973 S.W.2d at 861; *Fust*, 947 S.W.2d at 427. The Court employs a "most liberal standard for reviewing the challenged provisions." *Akin*, 934 S.W.2d at 301. The plaintiffs cannot meet their burden because Ordinance 2403 does not violate any applicable procedural provision. The judgment of the trial court must be reversed to the extent that it was in favor of the plaintiffs.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(3). The undisputed facts show that the plaintiffs were not entitled to relief on any of the numerous claims asserted in their second amended petition. Rather, the undisputed facts show that Ordinance 2403 and Ordinance 2465 are valid and enforceable. The City was entitled to judgment as a matter of law. The Court should reverse the judgment of the trial court to the extent that it was in favor of

the plaintiffs and enter judgment in favor of Defendant City of Cape Girardeau, Missouri, on all claims.

In the alternative, if the Court finds the title of Ordinance 2403 to be underinclusive, the Court should follow its longstanding precedents and sever the portions that it finds to be offensive and hold the remainder to be effective.

Respectfully submitted,

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RULE 84.06 CERTIFICATE

1. a. The undersigned certifies pursuant to Rule 55.03(a) that this brief is signed by at least one attorney of record in the attorney's individual name. The signer's address, Missouri bar number, and telephone number are as follows:

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The undersigned certifies that this brief is not verified or accompanied by affidavit.

b. The undersigned certifies pursuant to Rule 55.03(b) to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that: (1) the matters set forth in this brief are not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the matters set forth in this brief are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

c. The undersigned certifies pursuant to Rule 55.03(c) that this brief does not seek sanctions.

2. The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b).

3. Relying on the word and line count of the word-processing system used to prepare this brief, the undersigned certifies that this brief contains 13,734 words and 1,296 lines of text.

4. Pursuant to Rule 84.06(g), the undersigned certifies that the disks containing this brief that are filed with the Court and served on the parties have been scanned for viruses and that they are virus-free.

_____

Jeffery T. McPherson

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this brief and a disk containing the brief were mailed, first-class postage prepaid, on October 16, 2001, to:

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